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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 252.

NATIONAL PROTECTIVE INSURANCE COMPANY,
PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX

Petition for Writ of Certiorari

A. Summary Statement of the Matter Involved 2

B. Statement of the Jurisdiction of This Court 6

(1) Statutory provisions believed to sustain the jurisdiction 6

(2) The date of the judgment to be reviewed 6

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this Court 7

(4) Cases believed to sustain the jurisdiction of this Court 8

C. Questions Presented 8

D. Reasons Relied On for Allowance of the Writ 8

Conclusion 11

Brief in Support of Petition for Writ of Certiorari

A. Opinions of the Court Below 13

B. Grounds on Which the Jurisdiction of This Court Is Invoked 14

C. Statement of the Case 14

D. Specification of Errors Intended to Be Urged 14

E. Summary of the Argument 17

F. Argument 20

Conclusion 26

Table of Cases

Commissioner of Internal Revenue vs. Monarch Life Insurance Co., (1 C. C. A.) 114 F. 2d 314, 319 ..... 9, 18

Continental Insurance, Inc., vs. United States, (Ct. Cl.) 8 Fed. Supp. 474, 478 ..... 9, 18

Crooks vs. Harrelson, 282 U. S. 55, 63, 75 L. Ed. 156, 177 ..... 10, 19, 24
Forstmann vs. Rogers, (3 C. C. A.) 128 F. 2d 126, l. c. 129 ..... 10-11, 19, 25
Helvering vs. Illinois Life Insurance Co., 299 U. S. 88, 57 S. Ct. 63, 81 L. Ed. 56 ..... 9, 10, 18, 23
Helvering vs. Inter-Mountain Life Insurance Co., 294 U. S. 686, 690, 55 S. Ct. 572, 79 L. Ed. 1227, 1230 ..... 9, 17
Helvering vs. Inter-Mountain Life Insurance Co., 294 U. S. 686, 55 S. Ct. 572, 79 L. Ed. 1227 ..... 9, 10, 18, 22
Lamana-Panno-Fallo Industrial Insurance Co., Inc., vs. Commissioner of Internal Revenue, (5 C. C. A.) 127 F. 2d 56, 59 ..... 10, 18, 21, 23
Maryland Casualty Co. vs. United States, 251 U. S. 342, 350, 40 S. Ct. 155, 64 L. Ed. 297 ..... 9, 17, 20
McCoach vs. Insurance Co. of North America, 244 U. S. 585, 589, 37 S. Ct. 709, 61 L. Ed. 1333, 1336 ..... 9, 17, 24
New York Life Insurance Co. vs. Edwards, 271 U. S. 109, 119, 46 S. Ct. 436, 70 L. Ed. 859, 863 ..... 9, 17, 23
New World Life Insurance Co. vs. United States, (Ct. Cl.) 26 Fed. Supp. 444, l. c. 462, 466 ..... 21, 23, 24
United States vs. Boston Insurance Co., 269 U. S. 187, 46 S. Ct. 97, 70 L. Ed. 232 9

STATUTES

Act of February 13, 1925, Ch. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. 350) 6
Act of February 26, 1926, Ch. 27, Section 1001 (A), as amended June 7, 1934, Ch. 26, 48 Stat. 926 (26 U. S. C. A., Section 1141 (a)) 6
Articles 201 (a)-1 and 203 (a) (2)-1 of Treasury Regulations 86 15
Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711) 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26
Section 203 (a) (2) of the Revenue Acts of 1934 and 1936 15
Section 240 (a) of Judicial Code, as amended by Act of February 13, 1925, Ch. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347 (a)) 6

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of the United States:

Your petitioner, National Protective Insurance Company, in support of its petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered June 30, 1942, affirming a decision of the United States Board of Tax Appeals, determining a deficiency in petitioner's income tax during the years 1935 and 1936, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding involves alleged income tax deficiencies for the calendar years 1935 and 1936. Proceeding was initiated by a determination of deficiency by the Commissioner of Internal Revenue which was affirmed in findings of fact, opinion and order of redetermination of said tax by the United States Board of Tax Appeals promulgated July 10, 1941 (R. 11, 21; 44 B. T. A. 978), and again redetermined by the United States Board of Tax Appeals upon motion for rehearing on October 2, 1941, not reported (R. 25, 27).

Petitioner is a Missouri insurance corporation, having its principal office in Kansas City, Missouri (Petition, R. 3; Answer, R. 10; Petitioner's Exhibits Nos. 5, 2, 3 and 4, R. 59-69, 53, 55, 57). All of petitioner's business is transacted in the State of Missouri (R. 39).

Petitioner was originally, on November 30, 1926, organized under the provisions of Article 3 of Chapter 37 of the Revised Statutes of Missouri, 1929, relating to "Insurance on the Assessment Plan" (Petition, R. 3; Answer, R. 10; Petitioner's Exhibit 1, R. 51), and during the time petitioner was engaged in business under said statutes, it issued life insurance contracts, health and accident insurance contracts (R. 39).

On April 2, 1932, by amended articles of incorporation, petitioner was reincorporated and authorized to engage in business pursuant to the provisions of Article 4 of Chapter 37, Revised Statutes of Missouri, 1929, relating to insurance on the Stipulated Premium Plan (Petition and Answer, R. 39; Petitioner's Exhibit 5, R. 59-69).

During 1935 and 1936 (the years in question here) and prior thereto, pursuant to its authorization to engage in the insurance business under the provisions of Article 4 of Chapter 37 of the Revised Statutes of Missouri, 1929,

relating to "Insurance on the Stipulated Premium Plan," petitioner issued life contracts and health and accident contracts (R. 39). Petitioner's life policies are non-cancellable and petitioner's health and accident policies are cancellable (R. 39).

Petitioner sets aside a reserve fund to fulfill its life insurance coverage (R. 39; Petitioner's Exhibits Nos. 7, 9 and 11, R. 91-103, 125-137, 159-171). This reserve fund is required by the Missouri law under which petitioner does business (R. 45), and represents the amount which, improved with interest at 3 1/2% per annum, and future premiums, will discharge petitioner's contingent liability on its life insurance coverage upon the basis of The American Experience Table (R. 39). This is admitted (R. 40). It was set up as a liability in petitioner's annual reports to the Missouri Superintendent of Insurance (Petitioner's Exhibits Nos. 6 to 11, inclusive, R. 71-171).

Petitioner also sets up as a liability in its annual reports to the Missouri Superintendent of Insurance an "unearned premium" account (R. 40, Petitioner's Exhibits Nos. 6, 8 and 10, R. 71-89, 105-123 and 139-157). This account represents the unearned portion of the premiums paid petitioner upon its health and accident business (R. 40). It represents that portion of the premium which belongs to the policyholder (R. 42). It cannot be used by petitioner (R. 42). It is created and maintained for the purpose of refunding to policyholders unearned premiums upon cancelled health and accident coverage (R. 43); not for the purpose of reinsurance (R. 43) and it does not involve any calculation based upon contingencies or upon any table of experience (R. 41-42). Nor does it involve any calculation which takes into consideration any interest or earnings or improvement of the fund (R. 40; Finding of Fact in Order of October 2, 1941, promulgated by the Board of Tax Appeals, R. 26).

There is no Missouri statute or law requiring stipulated premium plan companies, such as the petitioner, to

maintain a reserve for health and accident coverage and there is no statute empowering the Missouri Superintendent of Insurance to promulgate rules and regulations with respect to the maintenance of such an account and the unearned premium account of petitioner was not required by express statutory provisions or by rules and regulations of the Missouri Superintendent of Insurance promulgated in the exercise of power conferred by statute (R. 45; Findings of Fact in October 2, 1941, Order, R. 27; Opinion, United States Circuit Court of Appeals, R.).

Petitioner has no other fund which might be regarded as a reserve for its health and accident coverage (R. 40; Petitioner's Exhibits Nos. 6-11, inclusive, R. 71-171, inclusive).

In 1934, petitioner's premium income from its health and accident business was $591,083.75 and from its life business $11,380.35 (R. 44; Petitioner's Exhibit 6, R. 71-89). In 1935, petitioner's premium income from its health and accident business was $636,631.38 and from its life business $11,647.15 (R. 44; Petitioner's Exhibit 8, R. 105-123). In 1936, petitioner's premium income from its health and accident business was $688,001.41 and from its life business $12,911.80 (R. 44; Petitioner's Exhibit 10, R. 139-157).

Petitioner's amended articles of incorporation, entered into on April 2, 1932, and approved by the Missouri Superintendent of Insurance (Petitioner's Exhibit 5, R. 46) provided that petitioner's unearned premium account should be calculated upon the basis of 15% of its aggregate gross premiums (Petitioner's Exhibit 5, R. 46). Fifteen per cent was set up because petitioner only had sufficient money to meet that requirement (R. 46).

On October 14, 1935, petitioner was required by R. E. O'Malley, the Missouri Superintendent of Insurance, to enter into an agreement as a matter of solvency by which petitioner agreed to set up an unearned premium account of 15% of the aggregate gross premiums upon its health

and accident business for the years 1935 and 1936, and then to increase the unearned premium account 5% each year until it reached 50% of the premiums in force (Petitioner's Exhibit 12, R. 173-177).

Petitioner's books are kept on an accrual basis (R. 41).

Respondent, by notice of deficiency, mailed to petitioner on December 12, 1939, determined deficiencies in income taxes from the petitioner in the amount of $10,338.71 for the calendar year 1935 and in the amount of $5,925.21 for the calendar year 1936. A timely petition, appealing from the respondent's determination, was filed by petitioner with the United States Board of Tax Appeals on March 9, 1940. The case was heard on November 13, and 15, 1940. A memorandum, finding of facts and opinion was promulgated by the board on July 10, 1941. Rehearing was granted and opinion and decision rendered redetermining deficiencies in income taxes due from petitioner in the same amounts theretofore determined. Appeal was duly taken by petition for review to the United States Circuit Court of Appeals for the Eighth Circuit, No. 12216, and said Court entered its opinion on June 30, 1942, affirming the decision of the Board of Tax Appeals.

Respondent contends that petitioner's unearned premium account is a reserve on petitioner's health and accident coverage (R. 8 and 9) within the meaning of "total reserve funds" in section 201 (a), Rev. Acts, etc. The Board of Tax Appeals so held and the United States Circuit Court of Appeals so held (R. 189).

Petitioner contends that this account is not a reserve (R. 3) within said section.

If, as the Court below held (R. 189) and as respondent contended, petitioner's unearned premium account is a reserve fund maintained on its health and accident coverage, within the meaning of Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711), petitioner is taxable as

an insurance company other than life or mutual, and the decision of the Circuit Court of Appeals should be affirmed (Petitioner's Exhibits Nos. 6-11, inclusive, R. 71-171). If, as petitioner contends, its unearned premium account is not a reserve fund for the fulfillment of its health and accident contracts, within the meaning of Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711), petitioner's reserves for the fulfillment of its life insurance contracts constitute its only reserves and petitioner is taxable as a life insurance company, in which instance there is no additional tax due and the decision of the Court of Appeals should be reversed.

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

(1) Statutory provisions believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347 (a)), and under the same Act, Ch. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. 350); and the Act of February 26, 1926, Ch. 27, Section 1001 (A), as amended June 7, 1934, Ch. 26, 48 Stat. 926 (26 U. S. C. A., Section 1141 (a)).

(2) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit affirming the decision of the Board of Tax Appeals was entered on June 30, 1942 (R. 191). The issuance of the mandate has been stayed pending the granting of this application (R. 193). This petition, with supporting brief, and the certified record are filed within thirty days next after final judgment.

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this Court.

The nature of the case (whether petitioner is subject to be taxed as a "life insurance company" or a "company other than life or mutual," within the meaning of Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711)), has been heretofore stated. The Circuit court of appeals ruled (R. 189): (1) that, although petitioner's unearned premium account was not strictly an insurance reserve, that it constituted a reserve within the meaning of the term "total reserve funds" in Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711); (2) that petitioner's unearned premium account, although not "required by law," was nevertheless an insurance reserve set aside under principles of ordinary business prudence; (3) that Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711) provided that an insurance company should be classified according to the predominate type of business done by that insurance company rather than being measured by its reserves; (4) that the term "total reserve funds" within the meaning of Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711) contemplates all reserves or funds of any kind or character set aside as a matter of solvency or protective business prudence even though such reserves or funds bear no relation to insurance and are not "required by law"; (5) that although Congress in enacting Section 201 (a) of the Revenue Acts of 1934 and 1936 stated the measure or rule in determining the character of an insurance company for income tax purposes should be the proportion of its reserves held for the fulfillment of life contracts as against the proportion of its reserves held for the fulfillment of other insurance contracts, that Congress really intended to state that the character

of an insurance company for income tax purposes should be determined by the proportion of its premium income received either from life insurance contracts or from other insurance contracts. Each of such rulings is reviewable by this Court under the appropriate statutory provisions noted.

(4) Cases believed to sustain the jurisdiction of this Court.

This Court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiorari.

C.

QUESTIONS PRESENTED.

Is petitioner subject to be classified as a "life insurance company," or is it subject to be taxed as an "insurance company other than life or mutual" for income tax purposes within the meaning of Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711).

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) In ruling (R. 189) that petitioner's unearned premium account, although not required by law, and although it was not held for the fulfillment of petitioner's health and accident coverage, was a "reserve fund," within the meaning of Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710,

1711), the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, namely: *Maryland Casualty Company* v. *United States*, 251 U. S. 342, 350, 40 S. Ct. 155, 64 L. Ed. 297; *Helvering* v. *Inter-Mountain Life Insurance Company*, 294 U. S. 686, 690, 55 S. Ct. 572, 79 L. Ed. 1227, 1230; *McCoach* v. *Insurance Company of North America*, 244 U. S. 585, 589, 37 S. Ct. 709, 61 L. Ed. 1333, 1336; *United States* v. *Boston Insurance Company*, 269 U. S. 187, 46 S. Ct. 97, 70 L. Ed. 232; *New York Life Insurance Company* v. *Edwards*, 271 U. S. 109, 119, 46 S. Ct. 436, 70 L. Ed. 859, 863; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on the same matter, namely: *Commissioner of Internal Revenue* v. *Monarch Life Insurance Company*, (1st C. C. A.) 114 F. 2d 314, 319; and with the United States Court of Claims, namely: *Continental Assurance, Inc.*, v. *United States*, (Ct. Cl.) 8 Fed. Supp. 474, 478; or if, contrary to the contention of petitioner, the ruling below is not literally in conflict with the foregoing decisions, it presents an important question of federal law which should be settled by this Court.

(2) In ruling (R. 190, 191) that the term "total reserve funds" within the meaning of Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711) contemplates all reserves or funds of any kind or character set aside as a matter of solvency or protective business prudence even though such reserves or funds bear no relation to insurance and are not "required by law," the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court, namely, *Helvering* v. *Illinois Life Ins. Co.*, 299 U. S. 88, 57 S. Ct. 63, 81 L. Ed. 56; *Helvering* v. *Inter-Mountain Life Ins. Co.*, 294 U. S. 686, 55 S. Ct. 572, 79 L. Ed. 1227, and in conflict with decisions of other Circuit Courts of Appeal, namely, *Commissioner of Int. Rev.* v. *Monarch Life Ins.*

Co., 114 F. 2d 314; *Lamana-Panno-Fallo Industrial Ins. Co.*, v. *Commissioner of Internal Revenue*, (5 C. C. A.) 127 F. 2d 56, 59.

(3) In holding that although petitioner's unearned premium account was set up as a matter of "protective business prudence," and although it is and was purely a matter of solvency, set up to prevent the impairment of the company (R. 173) that said unearned premium account was a reserve within the meaning of the term "total reserve funds" as used in Section 201 (a) of the Revenue Acts of 1934 (48 Stat. 680, 731) and 1936 (49 Stat. 1648, 1710, 1711), the Court of Appeals has decided an important federal question in a way probably in conflict with applicable decisions of this Court, namely: *Helvering* v. *Illinois Life Ins. Co.*, 299 U. S. 88, 57 S. Ct. 63, 81 L. Ed. 56; *Helvering* v. *Inter-Mountain Life Ins. Co.*, 294 U. S. 686, 55 S. Ct. 572, 79 L. Ed. 1227. Or if not literally in conflict therewith, the Circuit Court of Appeals has decided an important federal question which has not been, but which should be decided by this Court.

(4) In ruling that although Congress in enacting Section 201 (a) of the Revenue Acts of 1934 and 1936 stated the measure or rule in determining the character of an insurance company for income tax purposes should be the proportion of its reserves held for the fulfillment of life contracts as against the proportion of its reserves held for the fulfillment of other insurance contracts, that Congress really intended to state that the character of an insurance company for income tax purposes should be determined by the proportion of its premium income received either from life insurance contracts or from other insurance contracts, the court below decided an important question of federal law in a manner probably in conflict with decisions of this court, namely, *Crooks* v. *Harrelson*, 282 U. S. 55, 63, 75 L. Ed. 156, 177, and with decisions of other courts of appeal, namely, *Forstmann* v.

Rogers, (3 C. C. A.) 128 F. 2d 126, in that the court below in attempting to construe Section 201 (a) of the Revenue Acts of 1934 and 1936 judicially substituted for the plain and unambiguous language of Congress its own language and rewrote Section 201 (a) of the Revenue Acts of 1934 and 1936, thus encroaching upon the legislative power of Congress.

Conclusion.

The question presented and the rulings whereunder such question was decided by the Circuit Court of Appeals are of grave public importance. Unless the decision below is reviewed, the law relating to the definition and classification of life insurance companies, for income tax purposes, as measured by their "reserve funds" will be left in confusion. The question is one of fundamental importance, which, in the public interest, should be determined by this Court.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this court a full and complete transcript of record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket number 12216, *National Protective Insurance Company, petitioner,* v. *Commissioner of Internal Revenue, respondent,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this Court; and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit filed with this petition may be treated as a return to said Writ of Certiorari; and your petitioner prays that it may have such other and

further remedies in the premises as to the Court may seem appropriate and in conformity with law.

National Protective Insurance Company,
Petitioner,

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